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CONTRACTUAL GROWTH OF UNEARNED PROFITS.

The modern common law of both England and the United States has plainly sanctioned an unearned surplus and declared legal various forms of monopoly gain. New rights have been created by legalizing scarcity surpluses derived wholly from the growth of demand and goodwill. Long lists of opinions have established new restraints upon trade by means of which the value of goodwill has been increased, capitalized, and made to yield great gains. Contractual rights have been used to establish social and legal relations that afford opportunity for accumulating huge unearned increments,—relations which possess essentially the same characteristics as private property in land; and, as they afford differential advantages, the scarcity surplus is not unlike rent. Individuals prize these rights because they give opportunity to secure wealth created by others, and their value to the entrepreneur is in proportion to the amount of the unearned increment thus acquired above the costs of production. These rights are obviously not the result of the productive efforts of men, but permanent opportunities created solely through the evolution of law. The contractual surplus of the exploiter depends entirely upon the trend in judicial opinion and the inability of society to redress its wrongs.

The unearned scarcity surplus exists because one of the individuals in a bargain has given more for an economic good than its cost plus all earned profits. Every such gain is obtained at the expense of the consumer. It measures in every instance the surplus utility forced from him by stress of circumstances; and under freely competitive conditions, it rises and falls entirely in harmony with the variations of demand. It is then a simple market surplus, and is therefore termed here a speculative profit. In judicial opinions the term "speculative" embraces not only this form of surplus but also the profit of efficiency, because at times either may be more or less contingent in character. However, these different returns should be carefully distinguished. The former is a pure value surplus, while the latter, though sometimes contingent, is nevertheless the reward of efficiency.

Strangely enough, of all the pure value surpluses, only speculative profit and rent were considered legal under the early common law. The market surplus was always a variable quantity; price was never permanently fixed or predetermined; and the law

compelled buyer and seller to bargain and higgle freely with each other. In fact, English courts suppressed the unearned surplus by maintaining equal market opportunities for both buyers and sellers. As late as 1800 it was a crime to speculate in the necessaries of life or to spread rumors for the purpose of enhancing prices. The essential rights of both sellers and consumers to enjoy a free and open market are presented in an illuminating opinion:

> "God forbid that this court should do any thing that should interfere with the legal freedom of trade. In support of it the law has declared, and that law has repeatedly been acted upon, that to violate the freedom of trade by intercepting commodities in their way to market, taking them from the owner by force, or, which is the same thing, obliging him to accept a less price than he demands, and carrying them away against his will, or committing the like violation upon him in the market, is a capital offence, for which men have forfeited their lives to the law; for the law so far protects the freedom of trade as to encourage men to bring their goods to market, by punishing those who by acts of violence deter others by so doing. But the same law that protects the proprietors of merchandize takes an interest also in the concerns of the public, by protecting the poor man against the avarice of the rich; and from all time it has been an offence against the public to commit practices to enhance the price of merchandize coming to market, particularly the necessaries of life, for the purpose of enriching an individual. * * *
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> "That law, for the protection of those who are obliged to resort to market for the purpose of purchasing, we are bound to administer, as well as that which exists to protect those who resort to market for the purpose of selling."[1]

Stated concisely, it was formerly against public policy to demand a set or fixed price. Neither could prices be established by agreement. The all-important competitive principle protected alike producer and consumer. The former was not to be hindered in marketing his goods freely; and the latter was to have an opportunity to purchase commodities at a fair price. The consumer's rights in the market were at that time fully as important as those of the seller; and to maintain proper exchange values, laws were at one time enacted against engrossing, regrat-

[1] King *v.* Waddington (1800) 1 East. 143, 163 *et seq.*

ing and forestalling. A fair price to the consumer was the customary or usual value of a commodity; and this ancient rule, therefore, made the exchange price depend ultimately upon the constituent elements of its cost.

American courts seem to have largely overlooked the case of *King* v. *Waddington,* but other English decisions were relied upon for a time to support the principle of free competition. The public policy of a free and open market was given support in three decisions. In *People* v. *Fisher*[2] Chief Justice Savage said:

> "Combinations and confederacies to *enhance* or *reduce* the prices of labor, or of any articles of trade or commerce, are injurious. They may be oppressive, by compelling the public to give more for an article of necessity or of convenience than it is worth; or on the other hand, of compelling the labor of the mechanic for less than its value."

Again, he says:

> "It is true, that no great danger is to be apprehended on account of the impracticability of such universal combinations. But if universally or even generally entered into, they would be prejudicial to trade and to the public; they are wrong in each particular case. The truth is, that industry requires no such means to support it. Competition is the life of trade."[3]

Again, in *Hooker* v. *Vandewater,*[4] it was stated:

> "That the raising of the price of freights for the transportation of merchandise or passengers upon our canals is a matter of public concern, and in which the public have a deep interest, does not admit of doubt. It is a familiar maxim, that competition is the life of trade. It follows, that whatever destroys, or even relaxes, competition in trade, is injurious if not fatal to it."

In a similar case in the same state during the following year a like decision was rendered in which common law principles were carefully reviewed:

> "It is nothing less," declared the court, "than the attainment of an exemption of the standard of

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2 (N. Y. 1835) 14 Wend. 9, 18.

3 *Ibid,* p. 19.

4 (N. Y. 1847) 4 Denio 349, 353.

> freights, and the facilities and accommodations to be rendered to the public from the wholesome influence of rivalry and competition."[5]

Furthermore, to the objection of an attorney that the dealers in a particular city or place often had a tacit understanding from day to day as to the price of a commodity, the court replied:

> "That is true, and it is not necessary to inquire whether such a system might not be carried so far, and be accompanied with such circumstances and regulations as to render it unlawful."[6]

The articles of association in the case were therefore held to be illegal. Mr. Justice McKissock states in this opinion that the articles "unquestionably contravene public policy, and are manifestly injurious to the interest of the state."[7] This statement seems to contain what was at that time the accepted theory of the common law. But this principle was, however, soon to be overthrown; and an old English case furnished the necessary precedent to turn judicial opinion and to secure its rejection by American courts.

This was the remarkable case of *Mitchell* v. *Reynolds*,[8] wherein a general restraint upon trade was declared to be illegal. It was emphasized that a contract not to trade in any part of England was void, for "it can never be useful to any man to restrain another from trading in all places, * * * unless he intends a monopoly, which is a crime."[9] Contracts were therefore divided at this time into those which work a general restraint of trade and those which affect it to a less degree.

From this notable case may be traced five legal-economic principles which have vitally influenced the accumulation of the unearned increment. These fall naturally into two groups. The first three tend to restrict competition; the last two tend to preserve it.

I. Voluntary contracts and agreements accompanied with adequate consideration should be fully protected and seldom set aside.[10] This is one of the most important principles of the

[5] Stanton *v.* Allen (1848) 5 Denio 434, 440.

[6] *Ibid*, p. 442.

[7] *Ibid*, p. 443.

[8] (1711) 1 Peere Will 181.

[9] *Ibid*, p. 193.

[10] *Ibid*, p. 191, 5thly.

common law. It guarantees the individual right of contract,—that is, freedom of economic action within a prescribed sphere. Freedom of contract, then, bears an important relation to the competitive principle; for as the right of contract changes so must the scope of the competitive principle. Zealous in maintaining this contractual privilege, the former competitive principle has been largely modified by state courts and restraint of trade is allowed to take place up to the point at which a monopoly is finally established.

II. It was asserted that contracts in partial restraint of trade may prove beneficial to the community by eliminating competition or reducing the number of enterprises.[11] This was a distinct departure from the ancient competitive principle which had long served to nullify or to check restraints upon trade and competition. It was a comment that was taken up, however, and emphasized in American law more than a century after it was made. It allows combination between producers for the express purpose of eliminating competition; and it has served as the basis of a new economic principle in legal opinions which has greatly influenced the distribution of wealth.

Freedom of trade has, in part, given way to freedom of contract. The competitive principle has been greatly restricted by American courts; the more modern interpretation of "a fair price," due to the spirit of commercial speculation, tends to allow the entrepreneur all that the trade will bear. This important departure from ancient principles is due largely to the evolution of contractual rights in relation to the exploitation of demand. To be sure, courts of law rigorously protect the principle of public policy by which the welfare of the state is preserved. The welfare of the nation surmounts, of course, the rights of any individual. Yet constant evolution of the contractual right has encroached upon the ancient sphere of public policy. For good or evil the former limits of public policy have been restricted in this respect and freedom to contract has been greatly enlarged. Not the least important factor in this great change in legal reasoning was the ancient case of *Mitchell* v. *Reynolds*,[12] which came almost a century prior to the decision of *King* v. *Waddington*.[13] Only twenty-

[11] *Ibid*, p. 191, 4thly.

[12] *Supra*, footnote 8.

[13] *Supra*, footnote 1.

five years after the latter case, an issue relative to the restraint of trade arose in a Massachusetts court. A certain merchant had agreed to relinquish his interests in the boating business, to give all of his freight to a particular boatman on the Connecticut river, and not to encourage any other competitor. After reviewing in part the discussion of restraint of trade in *Mitchell* v. *Reynolds,* Mr. Justice Welde concluded concerning the issue:

> "It must therefore be decided on general principles, rather than by express authority. Whether competition in trade be useful to the public or otherwise, will depend on circumstances. I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen engaged in commercial concerns. There is a tendency, I think, to overdo trade, and such is the enterprise and activity of our citizens that small discouragements will have no injurious effect in checking in some degree a spirit of competition. An agreement with a tradesman to give him all the promisor's custom or business, upon fair terms, and not to encourage a rival tradesman to his injury, can hardly be considered as a restraint of trade. Certainly it is not such a restraint as would be injurious to the public, for in proportion as it discourages one party it encourages another."[14]

The courts of New York soon reversed their former opinions and other states likewise took up the new economic principle that competition may be restrained when injurious to trade. In 1839 a large combination of vessel owners which had driven the principal competitor out of business and raised the rate of passenger fares on the Erie canal was declared legal. "Competition in business," said the court, "though generally beneficial to the public, may be carried to such excess as to become an evil."[15] In 1851 an association of warehousemen and mill owners formed for the purpose of depressing and controlling the price of wheat in Milwaukee was held good on the same ground. The court denied that competition is the life of trade. The maxim was condemned in no uncertain words:

> "It is in fact the shibboleth of mere gambling

[14] Palmer *v.* Stebbins (1825) 20 Mass. 188, 192 *et seq.*; also quoted in Whitney *v.* Slayton (1855) 40 Me. 224, 230 *et seq.*

[15] Chappel *v.* Brockway (N. Y. 1839) 21 Wend. 157, 164.

> speculation, and it is hardly entitled to rank as an axiom in the jurisprudence of this country."[16]

In 1855 the Supreme Court of Maine, following the opinion of the Massachusetts court,[17] referred to the ancient rule against restraint of trade as follows:

> "This, then, is not the country, or the time, when it is expedient to enforce rigorously the ancient common law rule, and restrict the exceptions to narrow limits, but rather to give the latter a liberal construction."[18]

In all the early cases the idea that limitation of competition is good for trade, seems to have been drawn directly from the provisions selected here from the opinion in *Mitchell* v. *Reynolds.*[19] In short, this famous case furnished the theoretical basis of a most important economic doctrine. And upon the American courts must fall the responsibility and the credit for perpetuating in American law a theory that needed only present economic conditions to make it of tremendous importance.[20]

III. It was asserted that the owner of a business possesses a legal right to his custom or goodwill which may be parted with under certain conditions.[21] Beginning with this brief opinion, the increasing importance of goodwill has gradually influenced the contractual restraint upon trade and the growth of the unearned surplus. Contracts of which goodwill constitutes the economic basis of trade restraint are innumerable. Furthermore, the economic and legal phases of goodwill are constantly increasing in complexity, affording an ever-growing opportunity for contractual restraint and the accumulation of unearned increments. Mr. Justice Story has broadly defined goodwill as,

> "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital,

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16 Kellogg *v.* Larkin (Wis. 1851) 3 Pin. 123, 150.

17 Palmer *v.* Stebbins, *supra,* footnote 14.

18 Whitney *v.* Slayton, *supra,* footnote 14, at p. 231.

19 *Supra,* footnote 8.

20 Leslie *v.* Lorillard (1888) 110 N. Y. 519, 534, 18 N. E. 363; National Benefit Co. *v.*Union Hospital Co. (1891) 45 Minn. 272, 47 N. W. 806; Oakdale Mfg. Co. *v.* Garst (1894) 18 R. I. 484, 487, 28 Atl. 973; U. S. *v.* Nelson (1892) 52 Fed. 646, 647; Slaughter *v.* Coal and Coke Co. (1904) 55 W. Va. 642, 649, 47 S. E. 247.

21 Mitchell *v.* Reynolds, *supra,* footnote 8, at p. 191, 4thly.

> stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."[22]

Yet broad as this definition is, it is largely a hasty collection of ideas, without proper citations from legal opinions. It does not cover the subject of goodwill so as to give us a clear idea of its exact nature or contents. Indeed, judicial definitions of goodwill are disappointing because there is really no scientific treatment of the subject from an economic standpoint. Courts have defined goodwill almost entirely as an incident of the productive process. In fine, it is usually treated as property and as an essential element of the technical process. Certainly there has been a failure to study goodwill in its proper relation to wants and demand. Because of this fact, contracts have been allowed to restrain competition, coerce the consumer's goodwill, and to extract from the public an unearned surplus. It will therefore be necessary to point out briefly how these methods of legal restraint have increased and rendered permanent the profits of goodwill.

IV. It was declared that contracts in general restraint of trade tend to deprive one of the parties to it of his livelihood and the state of the services of a useful member.[23]

V. It was emphasized, finally, that contracts in general restraint of trade—as excluding one from trading in any part of England—tend to centralize control over industry and to create monopolies.[24]

These five principles are of great pertinency to all contracts in restraint of trade which have arisen since the time of the early Mitchell case. It will be seen at once that whether the individual be buyer or seller, the first three principles have served to increase both his contractual rights and his opportunities to limit competition. The last two principles, on the other hand, stand out as important checks on the first three. But even here, the

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22 Story on Partnership, § 99.

23 Mitchell *v.* Reynolds, *supra,* footnote 8, at p. 190, 2ndly.

24 *Ibid,* p. 190, 2ndly; 193, 3rdly.

rigorous enforcement of legal remedies against restraint of trade has been gradually relaxed, and these two principles have become greatly modified. Freedom of the individual to contract has seriously interfered with the ancient competitive regime; and industry has been forced to flow in artificial channels.

There are at least five distinct classes of agreements which have established trade restraints and rendered more or less permanent the profits of goodwill. Upon these contracts courts have passed important opinions. The first four relate especially to the entrepreneur's rights in goodwill, while the last concerns more particularly the advantages of efficiency in the physical process itself. Of course, courts of law have often included also these advantages of efficiency in goodwill.

In the first group, the custom, patronage, or goodwill of a single person is secured by contract as a permanent advantage of a certain enterprise. Consequently, the profits from this form of transaction, if expenses remain uniform, become fixed and definite. Where litigation has arisen under this form of agreement, the first three principles of Mitchell's case have worked in harmony. Freedom of the individual to contract was perceptibly increased, output became fixed, and competition was correspondingly restricted. In the leading case on this question, the court could see no evil in eliminating competition, but on the contrary maintained that a social good resulted. Moreover, it was stated in positive terms that,

> "It would be extravagant to suppose that any one by multiplying contracts of this kind, could obtain a monopoly of any particular trade."[25]

Obviously, the court failed to note that just such contracts may be used to create monopolies and that they are fundamentally wrong from an economic standpoint. There would be less objection to a contract which provides for the purchase or sale of a definite quantity of goods, leaving all persons free to engage in other transactions. But this form of agreement is an exclusive contract. It usually includes *all* of a vendor's product or *all* of a buyer's patronage, and, therefore, lays the basis of an exclusive privilege. Goodwill becomes permanently attached to a definite enterprise. In fine, this privilege becomes a differential advantage and not infrequently the means of securing a coerced unearned gain either from producers or consumers.

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[25] Palmer *v.* Stebbins, *supra,* footnote 14, at p. 193.

To be explicit, this mode of contracting has been used as a means to control markets, to exploit the public, and to secure monopoly advantages. Thus it has been used by a common carrier to secure permanently large quantities of freight traffic in return for lower rates.[26] A company engaged in the manufacture of wall paper was able to secure a contract with two manufacturing machine companies by which the latter agreed to sell their machines exclusively to it.[27] Again a contract offered by an electric lamp combination, providing that tungsten lamps were to be sold only to jobbers who agreed to purchase *all* of their carbon-filament lamps from the company, was assumed to be valid although such dealers were practically compelled to purchase three types of lamps under this agreement.[28] More pointedly, in a suit against a tobacco manufacturer who had discriminated between customers by selling certain products at a lower price to those who would not handle competing goods, the court was positive that the tobacco company had a right to fix the prices and the terms upon which it would contract to sell them.

> "The exercise of these undoubted rights," it was declared, "is essential to the very existence of free competition."[29]

In referring to the defendants, the court said:

> "They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales of the same commodities to different persons. * * * There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral."[30]

In fact the doctrine that it is legal and right to favor exclusive dealers has been approved in many decisions, and only recently have courts recognized the economic importance of the exclusive contract.[31]

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[26] Wiggins Ferry Co. *v.* Chicago & Alton R. R. (1881) 73 Mo. 389, 407.

[27] Continental Wall Paper Co. *v.* Lewis Voight & Sons Co. (1906) 148 Fed. 939, 952.

[28] United States *v.* General Electric Co., by consent decree was entered Oct. 12th, 1911, in the Federal District Court for the Northern District of Ohio.

[29] Whitwell *v.* Continental Tobacco Co. (1903) 125 Fed. 454, 461.

[30] *Ibid,* p. 461.

[31] For example, in the case of United States *v.* Eastman Kodak Co. (1915) 226 Fed. 62, 65, the court said, "Monopolies are created in various ways, and may constitute partial restraints of trade which of themselves

Moreover, where the supply of a good is limited, the exclusive contract has often become in the hands of one person the basis of a monopoly, and has in some instances been declared illegal. In certain counties of California, the price of lumber for the year 1881 was controlled by securing contracts from several mills for specified amounts of output which, it was agreed, should consti-

are not unreasonable, and contracts or combinations creating them are not necessarily invalid. The statute prohibits only such monopolies as are unjust and unreasonable restraints of trade." Again, this federal court said in relation to the legality of exclusive contracts: "Defendants argue generally that manufacturers have the legal right to encourage dealers by extra profits or by other fair inducements to handle their goods exclusively, that such an arrangement is to the interests of both, and that the Eastman Kodak Company was the first to induce stationers, druggists, and others to handle photographic goods as a side line. All this and more, it may be conceded, separated from other acts, might furnish no ground for holding that there was an illegal monopoly; but the arbitrary enforcement of the restrictive conditions by the establishment of a system of espionage, and the keeping of records of violations of such conditions, with a view of penalizing such dealers, are evidences of an intention to promote a monopoly." *Ibid*, p. 77 *et seq.*

A strong comment upon this form of the exclusive contract may be found in the Cream of Wheat case. In the opinion of Judge Hough, "Numerous individuals and corporations have been enjoined from restraining the trade of other people, * * *. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action." Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co. (1915) 224 Fed. 566, 574. In the Circuit Court of Appeals, to which the case was carried, Judge Lacombe made a similar statement. "We had supposed," said the judge, "that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern." Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co. (1915) 227 Fed. 46, 48.

Other examples will show the substantial place of this form of contract in law. In Wilder Mfg. Co. *v.* Corn Products Co. (1915) 236 U. S. 165, 173, 35 Sup. Ct. 398, the Supreme Court of the United States sustained the validity of an exclusive contract between a glucose manufacturer and a dealer who was to receive a percentage of the profits upon condition that he dealt exclusively with the refining company. The court said: "But we can see no ground whatever for holding that the contract of sale was illegal because of these conditions." On the other hand, an exclusive contract of this nature was declared illegal in Texas. By this agreement a Mr. Wood obtained six tons of ice a day at $3.00 a ton "or what his trade may demand" on condition that he "agrees to make all his purchases from the first party during the term of this contract." Wood *v.* Texas Ice & Cold Storage Co. (Tex. 1914) 171 S. W. 497. In Butterick Publishing Company v. Fisher (1909) 203 Mass. 122, 89 N. E. 189, an exclusive contract concerning the sale of patterns was condemned by a Massachusetts court, but in a suit brought by this same company in Wisconsin, the contract was sustained. Butterick Publishing Co. *v.* Rose (1910) 141 Wis. 533, 124 N. W. 647. In like manner the contract of a trading-stamp company in Massachusetts entered into with dealers on condition that they would not use trading stamps sold by any other company, was declared illegal, Merchants Legal Stamp Co. *v.* Murphy (1915) 220 Mass. 281, 107 N. E. 968, while a similar contract in Texas was held to be valid. Forrest Photographic Company *v.* Hutchinson Grocery Company (Tex. 1908) 108 S. W. 768.

tute their total sales for that year.[32] At another time in the same state, one man obtained agreements from several merchants to furnish him with a definite number of grain bags, as he should call for them, at a fixed price. This person did not purchase the bags, it will be observed, but because of the nature of the contract, he was able to prevent the owners from disposing of them, and thus he controlled the selling price.[33] In New York the Elmira coal market was dominated through contracts similar to the previous one, which became the means of regulating the shipment into that territory.[34] Upon the preceding facts, the agreements in these three instances were declared void because they were used primarily to enhance prices in a particular region. Nevertheless, for the time being, such contracts vested both parties to them with the unearned surplus profits of goodwill, the amounts of which depended on the economic pressure of competition between consumers. And it should be borne in mind that these agreements may serve to restrict trade effectively until some dissatisfied person seeks their abrogation by means of a legal remedy.

In the second class of contracts bearing on this subject, the social surplus and goodwill of a certain business are preserved and enhanced by eliminating both active and potential competitors. In authoritative opinions on this form of restraint, the first three principles of Mitchell's case again occupy a prominent place. Freedom of contract is further enlarged; and competition is still more definitely restricted. Thus where one individual bound himself by deed for the consideration of one dollar not to run a stage for the conveyance of passengers between Providence and Boston, the contract was held valid. "The publick," it was said, "appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage, * * * And it is indifferent to the publick, which of these runs a stage."[35] This one competitor was thus effectually disposed of. A similar issue occurred in *Chappel* v. *Brockway*.[36] The owner of a packet line on the Erie canal had been forced out of business through the combination of fifty competitors and

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[32] Mill & Lumber Co. *v.* Hayes (1888) 76 Cal. 387, 18 Pac. 391.

[33] Pacific Factor Co. *v.* Adler (1891) 90 Cal. 110, 27 Pac. 36.

[34] Arnot *v.* Pittston and Elmira Coal Co. (1877) 68 N. Y. 558.

[35] Pierce *v.* Fuller (1811) 8 Mass. 223, 227.

[36] (N. Y. 1839) 21 Wend. 157.

compelled to sign the usual contract by which he relinquished the right to compete as a common carrier on that canal. The judges were well aware of the fact that the first company had apparently eliminated this single competitor for the purpose of raising its passenger rates. Upon this exact point the court said:

> "Now, this is nothing more than the usual motive for entering into such contracts, and we might as well declare them all void at once, as to give way to this objection. It does not necessarily follow that the public was injured, because the price for carrying was raised."[37]

Again, in the case of the Old Dominion Company of the same state, this view was reaffirmed, but it was made clear that when such agreements in restraint of competition "threaten the public good in a distinctly appreciable manner, they should not be sustained." That is to say, the suppression of competition in itself and the practical control of an economic field is not to be questioned until the public good is threatened.[40] In these decisions it is clear that certain commercial rivals are not only driven from business but are also forced into contracts which bar them forever from again entering that particular field. In other words, the evolution in legal construction here works steadily against the unsuccessful rival and serves to preserve the increased profits and patronage of the victorious competitor. The result of these contracts is a constantly decreasing number of competitors, and as such rivals are eliminated, the goodwill of a community may be exploited until public policy demands a remedy. This form of contract, therefore, becomes in many instances an instrument to preserve effectively the business of the more successful entrepreneur against unfortunate competitors.

The entrepreneur may increase these contractual restraints until his legal rights amount to a monopoly of the productive processes. Such contracts are then declared illegal. In that case, vanquished competitors are freed from their agreements and may again enter the competitive field. But the exact point at which outlawry begins is not always plain. Only a court of law can determine when this fateful moment has arrived; and in the meantime the public may be mulcted in proportion to their pressing needs. It is therefore plain that the evolution of this phase of the right to contract, especially pertinent in its relation

[37] *Ibid.*, p. 164.

[40] Leslie *v.* Lorillard (1888) 110 N. Y. 519, 533, 18 N. E 363.

to the operation of the legal competitive principle and the rise of the unearned increment, calls for a remedy which does not depend upon so uncertain and distant a verdict as that of any legal tribunal.

A third form of contract sanctioned by the courts is made the basis of a combination between entrepreneurs who seek to suppress competition between themselves and to regulate the price of the commodity which they produce. The idea that competition is the life of trade has not only often been ridiculed, but, as a matter of fact, the first three principles of Mitchell's case have found expression in the form of an efficiency monopoly which certain courts have already recognized as legal. It may be defined as a co-operative combination which suppresses cutthroat competition, but at the same time does not establish high prices or reap excessive profits. It has been held in England, for example, that an agreement between traders to keep up prices, if subject to reasonable limitations as to time and space, is enforceable by injunction.[41] It has also been decided that an action could be maintained on a contract against wholesale traders who bound themselves not to sell below a specified price and to procure a similar agreement from certain retailers. The court was of the opinion that the question at issue was merely whether or not manufacturers might affix what terms they pleased to a contract of sale of their own commodities.[42] A still more advanced position was taken in *Hilton* v. *Eckersley*,[43] where an agreement had been entered into, by which all the master manufacturers in a large district in England were compelled to carry on their trades for a certain period under the direction of the majority, even to closing their factories though such action would be against their own individual interests. In declaring this contract not illegal, English courts have probably taken a position upon the vexed question of restraint of trade fully abreast of any of the leading cases on this subject in the United States.

A notable example of the efficiency monopoly in the United States is set forth in the case of *United States* v. *Wanslow*[44] in which the United Shoe Machinery Company also maintained prices by means of exclusive or tying contracts. Mr. Justice

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41 Cade *v.* Daly [1910] 1 Ir. 306.

42 Elliman *v.* Carrington [1901] 2 Ch. 275; Garst *v.* Charles (1905) 187 Mass. 144, 72 N. E. 839.

43 (1855) 6 El. & Bl. 47.

44 (1913) 227 U. S. 202, 33 Sup. Ct. 253.

Holmes explained that this company, formed in 1899, had ceased to sell shoe machinery to shoe manufacturers.

> "Instead, they only let machines, and on the condition that unless the shoe manufacturers use only machines of the kinds mentioned furnished by the defendants, or if they use any such machines furnished by other machinery makers, then all machines let by the defendants shall be taken away. This condition they constantly have enforced."[45]

As to the exact nature of the combination, he said:

> "On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent Case* 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best."[46]

An efficiency monopoly formed by agreement must depend in a large measure for its legality upon the fact that potential competition still exists. By way of illustration, we may select from the state of Wisconsin a case in which twelve warehousemen bound themselves to give to the proprietors of six flour mills "full, absolute and uninterrupted control of the Milwaukee wheat market" so far as they were able to do so. It was pointed out by the court that the parties to the contract could not possibly have intended to form a monopoly; for "all the rest of Wisconsin was an open and unrestricted market for the sale of wheat."[47] Following this tendency in law, it was decided by the Supreme Court of Texas in 1893 that an agreement between two or more insurance companies to insure their rates was in a general sense a combination in restraint of trade, but that the words "restrictions in trade" to be found in the state statutes did not apply to the case.[48] Again, three of four competing companies in New England by combining their interests were able to double the value of their stock; but it was decided[49] that a monopoly was

[45] *Ibid.*, p. 216.
[46] *Ibid.*, p. 217.
[47] Kellogg *v* .Larkin (Wis. 1851) 3 Pin. 123, 145.
[48] Insurance Co. *v.* State (1893) 86 Tex. 250, 24 S. W. 397.
[49] Oakdale Mfg. Co. *v.* Garst (1894) 18 R. I. 484, 28 Atl. 973.

not formed because the field of competition was open to others. The court found a strong precedent for its decision in *Skrainka* v. *Scharringhausen*.[50] In the latter case the representatives of twenty-four stone quarries of St. Louis formed an agreement in 1878 to fix a uniform price for their output and to secure a fair, proportionate sale of the product of each enterprise. This contract was held good "because, if competition reaches such a point that goods cannot be sold at living prices, many manufacturers must be driven out of business."[51]

Clear it is, however, that a contrary tendency has appeared in American law. Under a similar agreement in New York, the manufacturers of stone in 1900 found a court of that state opposed to the doctrine of potential competition. The facts went to show that the operators' profits here were practically nominal and that they had combined for exactly the same purpose as the manufacturers of stone in St. Louis. The court, however, was fully aware of the dangers of a monopoly and, therefore, considered the contract inimical to the welfare of both the producer and the consumer.[52] This New York decision represents the more recent interpretation of the common law principle against combinations in restraint of trade; for it is enough in several states to condemn an agreement as illegal if it is of such character that there is a likelihood of its being used to enhance prices.[53] This seems to be the most hopeful recent evolution in this common law principle. But the latter cannot, however, be depended upon as an effective remedy against the accumulation of monopoly gains; for it may not be to the interest of any member of the combination to repudiate his contract and withdraw from the association. Theoretically the monopoly under this new interpretation might dissolve automatically by the withdrawal of discontented parties, but it is plain that the public could not depend upon this as a natural course of things. The legal principle is, therefore, still impotent, and it is plain that even with the most recent common law interpretation, monopolies of a very dangerous character

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[50] (1880) 8 Mo. App. 522.

[51] *Ibid.*, p. 525.

[52] Cummings *v.* Union Blue Stone Co. (1900) 164 N. Y. 401, 58 N. E. 525.

[53] Salt Co. *v.* Guthrie (1880) 35 Ohio St. 666; State *v.* Standard Oil Co. (1892) 49 Ohio St. 137, 30 N. E. 297; State *v.* Eastern Coal Co. (1908) 29 R. I. 254, 70 Atl. 1; People *v.* North River Sugar Refining Co. (1889) 3 N. Y. Supp. 401; U. S. *v.* Am. Tobacco Co. (C. C. 1908) 164 Fed. 700; Mowing Co. *v.* Hardware Co. (1906) 75 S. C. 378, 55 S. E. 973.

may be discovered in either England or the United States against which there is as yet no direct remedy.[54]

The fourth form of contract appears when the entrepreneur, in disposing of his business, virtually restrains himself from again entering that particular occupation. As his custom or patronage may be of large value, it is patent that the universal restraint which he is able to place upon himself, renders more valuable the goodwill so alienated. The recognized rule which governs this restriction provides that if the restraint is not greater than sufficient to protect the interests of the purchaser, it is not unreasonable. This rule of reason was well enunciated in the English case of *Horner* v. *Graves*,[55] and seems, moreover, to have been received with general approval. But unfortunately there is a general division among the courts of our various states relative to its construction and application.

In the first place, in the greater number of states, the rule of public policy is taken as limiting the right of a person to alienate the goodwill of his own business; and, at the same time, the last two principles of Mitchell's case have served to check restraint upon trade. In harmony with the fourth principle, the individual may not bar himself from again entering into the same business within the state. A broader interpretation of the term "reasonable" would, it is said, deprive the seller of his livelihood and the state of the services of a useful member. "It is against the policy of the state," declared the Supreme Court of Illinois, "that a citizen shall not have the privilege of pursuing his lawful occupation at some place within its borders, but must leave the state in order to support himself and family."[56] The orthodox principle was also adopted in Ohio. A manufacturer had restrained himself by covenant from making a particular kind of candle any-

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[54] Cousins *v.* Smith (1807) 13 Ves. Jr. 542; Ladd *v.* The S. C. P. & M. Co. (1880) 53 Tex. 172; Seelingson v. Taylor Compress Co. (1882) 56 Tex. 219.

[55] (1831) 7 Bing. *735. Chief Justice Tindal said, "we do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interest of the party in favour of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interest of the public is void, on the ground of public policy," at p. 743.

[56] Union Strawboard Co. v. Bonfield (1901) 193 Ill. 420, 61 N. E. 1038; see Linn *v.* Sigsbee (1873) 67 Ill. 75; Hursen *v.* Gavin (1896) 162 Ill. 377, 44 N. E. 735; Lanzit *v.* Sefton Mfg. Co. (1900) 184 Ill. 326, 56 N. E. 393.

where in the United States. The contract prohibited the individual, of course, from engaging in that pursuit with which he was most familiar. It was said "the general effect must be, more or less to encourage idleness, and affect the price of such things as had been produced by his labor."[57] The economic argument has, however, been given more prominence in Kentucky. Such contracts are condemned on the ground that they destroy competition, injure industry, create exclusive privileges, and build up monopoly.[58] The context of these decisions make it plain that the interpretations given to these contracts were drawn largely from the early English common law doctrine, and that they coincide in the main with certain similar opinions rendered by the English courts.[59]

In the second place, the great cleavage at this point in judicial interpretation is seen when we turn to the later cases in England, New York, Rhode Island, and Massachusetts. The area and time of restraint in the sale of a business has not been confined within state boundaries; and obviously the profits of goodwill have by this means been greatly increased.

In the early history of the orthodox doctrine, English jurists had declared that it was impossible to take away a man's trade by contract for all time. Nevertheless, after a long list of similar cases, the limits of restraint affecting goodwill were relaxed. In *Rousillon* v. *Rousillon*,[60] a contract which precluded the defendant from engaging in the sale of champagne without limit as to territory was declared not unreasonable. In *Jones* v. *Lees*[61] the objection was entered that the restraint in the contract extended to all England, but Judge Bramnell replied that so did the privilege. This important departure was affirmed in the case of *Whittaker* v. *Howe*,[62] which, in fact, declared that an agreement made

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[57] Lange *v.* Werk (1853) 2 Ohio St. 519; Lufkin Rule Co. *v.* Fringeli (1898) 57 Ohio St. 596, 47 N. E. 1030; Thomas *v.* Adm'r of Miles (1854) 3 Ohio Stl 274; Morgan *v.* Perhamus (1881) 36 Ohio St. 517.

[58] Sutton *v.* Head (1887) 86 Ky. 156, 5 S. W. 410; see Pike *v.* Thomas (1817) 7 Ky. 486; Grundy *v.* Edwards (1832) 30 Ky. 368; Turner *v.* Johnson (1838) 37 Ky. 435; Merchants' Ice Co. *v.* Rohoman (1910) 138 Ky. 530, 128 S. W. 599; Clemons *v.* Meadows (1906) 123 Ky. 178, 94 S. W. 13; Western District Warehouse Co. *v.* Hobson (1895) 96 Ky. 550, 29 S. W. 308.

[59] See Wiley *v.* Baumgardner (1884) 97 Ind. 66; Johnson *v.* Gwinn (1884) 100 Ind. 466; Peltz *v.* Eichele (1876) 62 Mo. 171; Gill *v.* Ferris (1884) 82 Mo. 156.

[60] (1880) 14 Ch. D. 351.

[61] (1856) 1 H. & N. 189.

[62] (1841) 3 Beav. 383.

by a solicitor not to practice law in any part of Great Britain, was not illegal; and in a comparaitvely recent case, which has had a marked influence upon American decisions, the common law doctrine seems to have been completely overthrown.[63] Thus has the rule of reason made possible final or universal restraint upon any trade within the kingdom.

A similar evolution has occurred in the United States. The rule governing a reasonable restraint in New York has followed the tendency taken in English decisions; and, the restriction, which is made co-extensive with the privilege, has often exceeded the boundary of this state. The fourth principle in the Mitchell case has been completely repudiated; for, "when the restraint is general," there is no objection if it "is co-extensive only with the interest to be protected, and with the benefit meant to be conferred."[64] Finally, succeeding cases in this state have perpetuated this theory by making legal restraint of trade universal throughout the United States.[65]

The doctrine of reasonable restraint has also taken the more radical trend in the states of Massachusetts and Rhode Island. After adhering to the strict interpretation of this common law principle for over a century,[66] the courts of Massachusetts have finally accepted the interpretations presented by the decisions on this subject in New York and England. This important recantation is couched in words for which adequate authority may be found in an English case:

> "Now the House of Lords in England," explained the court, "has held by a unanimous decision in a recent case that such a limitation which covered the whole world was not unreasonable."[67]

In even more positive terms, Rhode Island has abrogated the ancient common law rule. Its Supreme Court has ridiculed the

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[63] Nordenfelt *v.* Maxim Nordenfelt *etc.* Co. [1894] A. C. 535.

[64] Diamond Match Co. *v.* Roeber (1887) 106 N. Y. 473, 482, 13 N. E. 419.

[65] Watertown Thermometer Co. *v.* Pool (1889) 51 Hun 157, 4 N. Y. Supp. 861; United States Cordage Co. *v.* William Walls' Sons R. Co. (1895) 90 Hun 429, 35 N. Y. Supp. 978; Hodge *v.* Sloan (1887) 107 N. Y. 244, 17 N. E. 335; Tode *v.* Gross (1891) 127 N. Y. 480, 28 N. E. 469; Underwood *v.* Smith (1892) 19 N. Y. Supp. 380; Ruton *v.* Everitt (1898) 35 App. Div. 412, 54 N. Y. Supp. 896.

[66] Alger *v.* Thatcher (1837) 36 Mass. 51; Taylor *v.* Blanchard (1866) 13 Allen 375; Bishop *v.* Palmer (1888) 146 Mass. 469, 16 N. E. 299; Handforth *v.* Jackson (1889) 150 Mass. 149, 22 N. E. 634.

[67] Anchor Electric Co. *v.* Hawkes (1898) 171 Mass. 101, 50 N. E. 509.

idea that a man drives himself to idleness or to expatriation, and thus injures the public, by agreeing not to follow some one calling within the limits of a particular state.[68] In fact, universal restriction of trade within the United States has been declared not unreasonable by this tribunal; and the evidence in certain cases has made obvious the great increase of speculative values in combinations under this form of contract.[69]

Certain it is, that the issue between the strict and the broad interpretation of "reasonable restraint," as it appears in these two groups of cases, still hangs in the balance. Yet it would seem that the Supreme Court of the United States has overruled in part the narrow interpretation adopted in the state decisions of California.[70]

> "It is clear," the Supreme Court has said, "that a stipulation that another shall not pursue his trade or employment at such a distance from the business of the person to be protected, as that it could not possibly affect or injure him, would be unreasonable and absurd. On the other hand, the stipulation is unobjectionable and binding which imposes the restraint to only such an extent of territory as may be necessary for the protection of the party making the stipulation, provided it does not violate the two indispensable conditions, that the other party be prevented from pursuing his calling, and that the country be not deprived of the benefit of his exertions."[71]

This is an important decision, but what the ultimate construction will be is difficult to predict. But certainly this single decision does not afford a solution of the matter; and two economic facts here are most pertinent to the issue between these two groups of state opinions: (a) The greater number of decisions on this particular point rest on the premise, that by means of such contracts one party was necessarily deprived of his occupation. Doubtless it will be seen at once that if restraint is allowed to extend beyond state boundaries, it will not be confined within the limits of any of the other states. (b) Evidence in the cases studied here indicates that purchasers of goodwill and similar op-

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[68] Herreshoff *v.* Boutineau (1890) 17 R. I. 6, 7, 19 Atl. 712.

[69] Oakdale Manufacturing Co. *v.* Garst, *supra*, footnote 49; Trenton Potteries Co. *v.* Oliphant (1899) 58 N. J. Eq. 507, 43 Atl. 723.

[70] More *v.* Bonnet (1870) 40 Cal. 254; Wright *v.* Ryder (1868) 36 Cal. 357.

[71] Oregon Steam Navigation Company *v.* Winsor (1873) 87 U. S. 64.

portunities greatly increased their profits and the value of their property by the elimination of competitors. Consequently, if universal restraint of trade is allowed in every state, the natural result will be a further tendency to form combinations and monopolies; for by purchasing the principal enterprises producing any one product, a few persons may be able by such contracts to exclude from further competition the very men who are best fitted by experience and ability to establish effective competition against concentrated industry.

Finally, there is a fifth class of contracts which relate solely to the sale of secret processes and peculiar trade advantages. To prevent the adoption and use of trade advantages by employees and the public, these are protected either by expressed or implied contracts. The latter case occurs where a confidential relation exists between persons engaged in a business venture. The law assumes an implied agreement to the effect that they will not divulge any trade secrets imparted to them. In like manner the owner is bound not to divulge such knowledge after its sale to another. At this point one fact deserves special attention. Trade secrets in themselves are thus recognized as property, and contracts for their sale or complete alienation are not in restraint of trade, because these processes, it is said, must be kept secret to retain their present value.[72] But it is nevertheless obvious that in disposing of such trade advantages, the owner must at the same time part with the patronage which cannot well be separated from the more tangible property; and, however strictly the common law rule of reason is interpreted, it does not prevent the complete alienation of the goodwill. This means that control over different competing trade secrets may pass by purchase into the hands of a single person; for their sale cannot be limited or restrained by law, unless they become thereby the basis of a monopoly. Men are accumulating great fortunes to-day from trade secrets which possess protected advantages of both efficiency and goodwill. That is, the common law thoroughly protects in this manner the efficiency profits of trade secrets; but the entrepreneur may, on the other hand, exploit by shrewd contracts the goodwill and thereby obtain an unearned surplus. There is a huge surplus between the efficiency profit of the secret process, which the entrepreneur obtains under active competition, and his profit at the

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[72] Fowle *v.* Park (1889) 131 U. S. 88, 9 Sup. Ct. 658; Vichery *v.* Welsh (1837) 19 Pick. 523-527; Tode *v.* Gross (1891) 127 N. Y. 480, 28 N. E. 469; Taylor *v.* Blanchard (1866) 13 Allen 375.

point of monopoly at which the law may finally be invoked to curb further accumulation. And there is no natural method of checking this growing restraint of trade or the arbitrary increase in the value of goodwill. It seems necessary, therefore, that the remedies to be recommended in the concluding section be applied where possible to the sale of trade secrets.

In presenting these five contracts, we have revealed the legal conditions under which large unearned surpluses have been accumulated. Whether the present opportunities for commercial exploitation of the public will be lessened depends largely upon the restriction of definite legal and economic forces, which, because of their great influence, are fraught with unusual interest.

It is therefore necessary at this point to submit frankly certain essential remedies which are most pertinent to the issue:

I. In the struggle to control the opportunities of the market, the growth of unearned surpluses from the exploitation of consumers may be checked by *forbidding the sale of goodwill by one competitor to another with an expressed agreement not to enter into competition with him.* Had the learned jurists of the early English common law courts decided once for all that the sale of goodwill by one competitor to another under such circumstances was in restraint of trade, as it undoubtedly was at that time, and consequently illegal, much of the unearned surpluses, which rest directly on such contractual relations would have been prevented thereby. The entrepreneur could, of course, as at the present time, sell an enterprise with its goodwill and immediately set up a similar one in competition with the first. But he would be less willing to sell to a business rival if he could not dispose of the goodwill to a much greater advantage by restraining himself (except in the case of trade secrets) from again entering into competition with him. And the purchaser would not be anxious to secure merely plant and equipment with no legal remedy in case the former owner became an effective competitor. However, the owner would still be at liberty to dispose of his business with its goodwill to a *new investor* and also reasonably restrain his own power of competing with him. Moreover, combinations of plants could also be made for the purpose of securing the economies of large scale production, but without the purchase of goodwill by agreements in restraint of trade. In a word, we have reached here a definite rule: The value of goodwill or patronage among freely competitive enterprises will tend automatically to equal

the normal cost of establishing it, to remain generally distributed among purchasers, and to become stationary even in industrial combinations because of the number of potential competitors.

These goodwill surpluses are in many cases easily recognized. That part of the purchase price which is in excess of the physical value of the plant and equipment, is often paid merely to avoid the competition of a dangerous rival; and the value of the goodwill of the remaining enterprises increases out of all proportion to the number of concerns eliminated. Men are easily lured into combinations by the fascinating prospects of speculative and monopoly gains, which at the same time tend to give to each of the remaining enterprises an artificial value that outweighs all estimates of its actual patronage or goodwill. And the public suffers long before a legal remedy may be applied.

II. American judges are seriously endeavoring to prevent restraint of trade, as they have defined it; but they have failed to see that the producer, who controls from 30 to 60 per cent. of the output of a commodity, is able to regulate price over a wide area and to secure an artificial surplus. Not until recently have courts become aware of the effective restraint upon trade and the serious evils arising from even partial monopolies. Clearly enough, American judges should endeavor to check all restraints upon trade which serve artificially to limit production and increase price.

III. Again, the ancient common law provision against monopolies has been revived in certain states. The Supreme Court of Michigan discovered that the Diamond Match Company had, by this form of contract, closed seventeen plants, and that thirteen factories were made to yield monumental profits for a total of thirty-one companies. The significant fact in this decision is, that the judges were not construing a statute, but were drawing their individual opinions entirely from the ancient principle formerly relied upon in England to check forestalling, engrossing and regrating. Upon this point the statement of Chief Justice Sherwood is clear and concise:

> "All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable; and ought to receive the condemnation of all courts."[73]

[73] Richardson *v.* Buhl (1889) 77 Mich. 633, 658, 659.

IV. The present evolution in the concentration and combination of industry in relation to contractual rights has acquired a legal and economic momentum that cannot be suddenly turned aside. At the same time, these five forms of contract have made possible a complex legal structure which has permitted the industrial liberty of the ancient common law to press beyond its former limits, to become, in many modern instances, legitimate economic piracy. Indeed, the competitive principle in practice has become, through its legal and economic evolution, an engine of destruction. All too frequently it has led to monopoly; and both speculative and monopoly profits still remain securely rooted in legal precedents. But American jurists are rapidly reconstructing and redefining the interpretations of monopoly, and there is a gradual revival of ancient principles which once safeguarded trade.

V. The most important force in this evolution of contractual rights is the tendency of state courts to expand by ever wider interpretations the "rule of reason" in the restraint of trade. And this tendency has constantly received substantial impetus from the more advanced decisions of English cases; the future sales of goodwill may be quadrupled in value by the influence upon state courts of the recent opinion in the Nordenfelt case.[74] Clearly enough, this opinion has practically overthrown the ancient law against restraint of trade. Yet this ruling may so endanger a nation's welfare, by excluding from some essential industry two-thirds of the entrepreneurs best fitted to carry it on, and may so close the avenues of trade and commerce by limiting the number of its enterprises, that a sudden war might make governmental interference necessary.

VI. A distinction has recently been made between combinations, which only restrain trade, and agreements which positively restrict competition. But the usual distinction between restraint of trade and restriction of competition is illogical and unsound from an economic standpoint. The suppression of competition is only another form of trade restriction by which product or price is controlled and an unearned increment is made possible,—that is, a restriction which becomes illegal only when it yields a monopoly profit. But other trade restrictions also serve to create large unearned surpluses, and it is certainly but a question of degree in

[74] Nordenfelt *v.* Maxim Nordenfelt *etc.* Co., *supra*, footnote 63.

economics whether legal robbery is carried on by shearing the public, collectively under monopoly control, or in smaller groups by partial restraint of trade.

VII. The accumulation of the unearned increment from *partial* restraint of trade has been unduly encouraged by legal decisions. In practice and in theory the entrepreneur has been given a wide scope of legal activity. Innumerable decisions make the profits of able pioneering to include the surpluses of exploitation of another's business or of the goodwill of the public. Sworn evidence of the accumulation of such wealth has disclosed riches which seem fabulous, even in modern times. We still need to revise our right of contract and to loosen the restrictions upon trade and commerce.

VIII. This brings us again to the distinction between efficiency profits and scarcity increments; and it would seem that courts have frequently confused the returns of efficiency with scarcity profits of goodwill. Efficiency profits arise primarily from the advantages embodied in the trade secret itself, while scarcity gains originate in goodwill. As the goodwill of a business cannot well be that of which knowledge is denied the public, it cannot be a part of this process, and may, perhaps, be entirely absent. For example, a secret process or patented article is often sold before it is put to a commercial use; and it may always be distinguished physically from that public regard or esteem which is known in economics as goodwill. The property rights in trade secrets and in goodwill are entirely separate, and judges, statesmen and economists should distinguish, of course, the efficiency profits of the physical process from the vacillating unearned scarcity surplus of goodwill.

IX. Of the five forms of contract, which we have thus briefly surveyed, especially has the fourth been employed to destroy the industrial liberty and independence of individual entrepreneurs. Among the various methods adopted to concentrate into the hands of a few the wealth of a particular industry, this seems to be the most enduring, the most inimical to purely cooperative combinations, the most logical device for perpetuating monopoly.

To some, it seems that the complexity of industry has outrun human ability to analyze it and that the tendency to combination and monopoly is but a natural evolution which society cannot

prevent. However this may be, it is at least plain that the process of elimination, which we have briefly described here, is constantly leaving a smaller number of men who are fitted at the present day to control and direct industry. And a still smaller number remain who have the exceptional means and the hardihood to stem the tide of competition that may be directed deliberately against a vigorous, determined entrepreneur struggling to rise to a position of industrial independence. Consequently, the wealth and power of the few who are not engulfed in the vortex of industrial strife, may threaten in time even the proper functioning of the government itself; and surely the evolution of the common law right of contract has materially aided these men in attaining the goal of their ambition.

C. J. FOREMAN.

UNIVERSITY OF ARKANSAS.